

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 10, 2002

HENRY LEE DAVIDSON, SR. v. VICKIE DENISE DAVIDSON

Appeal from the Circuit Court for Davidson County
No. 00D-1199 Marietta Shipley, Judge

No. M2001-01830-COA-R3-CV - Filed December 11, 2002

This appeal involves the dissolution of a sixteen-year marriage. Following a bench trial, the Circuit Court for Davidson County declared the parties divorced, divided their marital property and debts, made provisions for the custody and support of their two minor children, and awarded the wife rehabilitative spousal support for approximately ten years. The husband challenges the spousal support award on three grounds – that the wife does not need spousal support in light of the marital property she received, that the amount of spousal support is too high because the trial court miscalculated his income, and that the trial court erroneously prevented him from presenting evidence regarding the wife's fault. We have determined that the spousal support award is supported by the evidence and, therefore, we affirm it.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Jeffrey S. Pulley, Nashville, Tennessee, attorney for the appellant, Henry Lee Davidson, Sr.

Edward L. Hiland, Nashville, Tennessee, attorney (on appeal) for the appellee, Vickie Denise Davidson.

OPINION

I.

Henry Lee Davidson, Sr. and Vickie Denise Davidson were married in Chattanooga in May 1984. Mr. Davidson graduated from Tennessee State University, and Ms. Davidson later graduated from Tennessee State University in 1991. The parties' oldest son was born in January 1985, and their second son was born in April 1988. The parties apparently had difficulty managing their personal finances, and both parties filed for bankruptcy on at least one occasion during their marriage. At the time these proceedings started, Mr. Davidson was employed by BP Oil Company and also operated his own part-time lawn care and car detailing business. Ms. Davidson was employed by Broadcast Music, Inc. and also worked part-time at a retail clothing store for women.

On April 26, 2000, Mr. Davidson filed a complaint for divorce, citing irreconcilable differences, inappropriate marital conduct, and indignities. He also sought custody of the parties' two children. Because of financial constraints, the parties continued to live in the marital residence after Mr. Davidson filed for divorce. Ms. Davidson eventually responded to the divorce complaint by denying that Mr. Davidson had grounds for divorce and by requesting the dismissal of his complaint. She did not counterclaim for divorce.

In September 2000, Mr. Davidson requested an order granting him exclusive possession of the parties' house and temporary custody of the parties' children because of Ms. Davidson's "violent and abusive behavior," including kicking in doors and breaking the windshield of his car. After encountering difficulty in obtaining a hearing on his motion, Mr. Davidson petitioned for an order of protection. The trial court entered an order of protection on December 20, 2000 based on the parties' conduct that it later characterized as an "extreme case of parents fighting with each other." It was at this point that Mr. Davidson moved into an apartment, taking some furniture and other items of personal property with him.

The parties discussed their marital circumstances "informally" prior to trial but were apparently unable to resolve all their disagreements.¹ At the beginning of the trial on February 21, 2001, Ms. Davidson's lawyer announced that his client no longer opposed declaring the parties divorced in accordance with Tenn. Code Ann. § 36-4-129(b) (2001)² and asserted that this concession would avoid turning the trial into a "Jerry Springer circus." He also moved to amend Ms. Davidson's pleadings pursuant to Tenn. R. Civ. P. 15.02 to request custody of the parties' younger son, child support, rehabilitative spousal support, and an equitable share of the marital property. Mr. Davidson did not object to the amendments but did not agree with Ms. Davidson's proposals regarding custody of the parties' younger son, the division of the marital property, or spousal support.

Following a bench trial, the trial court declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129(b). The trial court also granted Mr. Davidson custody of the parties' older son and Ms. Davidson custody of the parties' younger son and made provisions for the payment of child support. After dividing the parties' marital property and allocating the marital debts, the trial court ordered Mr. Davidson to pay Ms. Davidson \$600 per month in rehabilitative spousal support until their oldest child graduated from high school and thereafter to pay Ms. Davidson \$250 per month for eight years.³ Each party submitted final divorce decrees and final parenting plans following the

¹The record does not clearly indicate the context in which these "informal" discussions took place. Because the trial court was one of the courts included in the Parenting Plan pilot project, Act of May 30, 1997, ch. 557, § 1, 1997 Tenn. Pub. Acts 1175, 1176, we presume that the parties in this case were required to attend a parent educational seminar and to participate in mediation of some sort.

²The lawyer also announced that Ms. Davidson would not oppose an irreconcilable differences divorce. The trial court reminded Ms. Davidson that an irreconcilable differences divorce was not available in light of the circumstances of this case.

³The trial court never explained its reasons for its rather unorthodox decision to link the duration of Mr. Davidson's spousal support obligation to his older son's high school graduation. In light of its custody decision, we presume that the trial court was attempting to offset Ms. Davidson's obligation to pay child support to Mr. Davidson until their older child graduated from high school.

trial. The trial court signed both orders despite the fact that they contained materially conflicting provisions. After this problem was brought to the trial court's attention, the trial court entered an amended final judgment of divorce and an order amending the previously filed parenting plan. Mr. Davidson has perfected this appeal.

II. THE ADEQUACY OF THE APPELLATE RECORD

Before addressing the substantive merits of Mr. Davidson's appeal, we are constrained to comment on the condition of the appellate record. In fact-intensive cases such as this one, efficient and thorough appellate review can take place only when the parties have provided the court with an adequate appellate record. An adequate record, in the words of Tenn. R. App. P. 24(a), is one that is "sufficient to convey a fair, accurate and complete account of what transpired [at trial] with respect to those issues that are the bases of appeal" The record in this case is, at best, marginally adequate.

In 1993, the Tennessee Supreme Court promulgated Tenn. S. Ct. R. 26 to facilitate a pilot project to assess whether videotaped records were a less costly, yet satisfactory, alternative to traditional written transcripts. As a result of an order entered by the Tennessee Supreme Court on October 31, 1996,⁴ the trial court became one of a handful of state courts using video technology to preserve the official record of their proceedings. The current consensus among virtually all lawyers and judges who have used video records to prepare appellate briefs and opinions during the past nine years is that the appellate application of video technology has not lived up to its promise for three reasons. First, the videotape playback equipment has proved to be cumbersome and difficult to use. Second, using video records has significantly increased the time and effort required to prepare appellate briefs and opinions because reviewing video records in real time is much more time consuming than reviewing a written record. Third, the expected cost savings to the taxpayers and the litigants have not been substantiated.

The poor quality of the video and audio reproduction in this case exacerbates the inherent shortcomings of videotaped records. The video picture is noisy and indistinct in places. The audio recording equipment in the trial court differs from the equipment installed in other courtrooms in which video recording equipment has been installed. Instead of six voice-activated microphones,⁵ only three microphones appear to be installed in the trial court – one at the witness stand, one at the speaker's podium, and one on the bench. In addition to the problems created by the lack of microphones, the microphone located at the witness stand was not working throughout this proceeding, and a malfunction in the voice-activation feature caused the camera to repeatedly focus on an empty witness chair for no apparent reason. As a result, significant portions of the witnesses' testimony is practically indecipherable, and the statements and arguments of counsel became difficult

⁴*In re Use of Videotape Equipment to Record Court Proceedings* (Tenn. Oct. 31, 1996). This order stated that "the trial courts of Davidson County are hereby granted authorization to use videotape equipment to record court proceedings" in accordance with Tenn. S. Ct. R. 26. The Tennessee Supreme Court amended Tenn. S. Ct. R. 26 on November 13, 2001 to permit the use of CD-ROM recordings in addition to videotape recordings.

⁵A typical installation has heretofore included voice activated microphones at the witness stand, the speaker's podium, in front of the jury box, on the bench, and one at each of the two counsel tables. Tennessee Judicial Conference, Ad Hoc Committee on Videotaped Trial Records, *Interim Report and Recommendations* 6 (Oct. 1996).

to understand any time they moved away from the speaker's podium or addressed the trial court from the counsel tables.

In addition to the technical shortcomings of the recording equipment, an apparent lack of familiarity with the proper operation of the equipment contributed to the shortcomings in the record in three material respects. First, the recording equipment was apparently not turned on until the trial was already well underway. Second, the audio equipment remained on during the trial court's "confidential" interview in chambers with the parties' children, as well as during a private discussion between the trial court and a staff member regarding the options for disposing of the marital home. Because the audio equipment remained on, these discussions in chambers were broadcast into the courtroom for all to hear. Third, the portion of the video recording of the trial court's decision from the bench is, for some unexplained reason, interrupted by a recording of approximately thirty seconds of a network television soap opera.

Finally, the adequacy of the record has been compromised by the trial court's failure to prepare and transmit to this court the testimony log and witness list required by Tenn. S. Ct. R. 26, § 2.01(c). In fact, the record does not contain any of the eleven documents tendered to and actually considered by the trial court during the trial.⁶ The videotape record depicts the trial court receiving and considering these documents. However, for some unexplained reason, the trial court failed to identify and admit any of them as exhibits.

The contents of these documents are obviously relevant and material to the issues being raised on this appeal. In their absence, and in the absence of any appropriate way to make them part of this record, we have laboriously and repeatedly reviewed the 5.5-hour videotape of the proceedings to glean from the witnesses' testimony enough information about their contents to decide the issues raised by Mr. Davidson on this appeal. Despite the disorganized presentations of the lawyers, the informality of the trial court, and the inherent shortcomings of the video record, we have extracted sufficient information to enable us to decide this appeal. There is no assurance that we would have the same success were we to be presented with a similar record in another case.

III. THE AWARD OF SPOUSAL SUPPORT

The only issues that Mr. Davidson has raised on appeal involve the rehabilitative spousal support award. First, he asserts that Ms. Davidson did not need spousal support in light of the marital property she received. He also insists that the trial court improperly prevented from him introducing evidence of fault which would have demonstrated that Ms. Davidson did not deserve spousal support. Finally, he insists that the amount of spousal support was too high because the trial court miscalculated the amount of his income.

⁶These items include: (1) information regarding Mr. Davidson's 401(k) plan, (2) the proposed distribution of the household items, (3) documents relating to Ms. Davidson's student loan, (4) documents regarding the parties' tax debts, (5) Mr. Davidson's income and expense statement, (6) Ms. Davidson's BMI pay stubs showing the money withheld from her salary, (7) copies of checks payable to Mr. Davidson that had been surreptitiously endorsed and cashed by Ms. Davidson, (8) the children's report cards, (9) Ms. Davidson's original income and expense statement, (10) Ms. Davidson's revised income and expense statement, and (11) a memorandum regarding Ms. Davidson's release of her consortium claim in one of Mr. Davidson's personal injury actions against a third party.

A.

There are no hard and fast rules for spousal support decisions. *Anderton v. Anderton*, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998). Trial courts have broad discretion to determine whether spousal support is needed and, if so, its nature, amount and duration. *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001). Appellate courts are generally disinclined to second-guess a trial court's spousal support decision unless it is not supported by the evidence or is contrary to public policies reflected in the applicable statutes. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994). Our role is not to fine-tune a trial court's spousal support award, *Hartman v. Hartman*, No. E2000-01927-COA-R3-CV, 2001 WL 823188, at *7 (Tenn. Ct. App. July 20, 2001) (No Tenn. R. App. P. 11 application filed), but rather to determine whether the award reflects a proper application of the relevant legal principles and that it is not clearly unreasonable. *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001).

Tenn. Code Ann. § 36-5-101 (d)(1) (2001) reflects a preference for temporary, rehabilitative spousal support, as opposed to long-term support. *Crabtree v. Crabtree*, 16 S.W.3d 356, 358 (Tenn. 2000); *Goodman v. Goodman*, 8 S.W.3d 289, 293 (Tenn. Ct. App. 1999). Rehabilitative support is intended to enable an economically disadvantaged spouse to acquire additional education or training or to provide that spouse with temporary income during the post-divorce economic adjustment. *Robertson v. Robertson*, 76 S.W.3d 337, 340-41 (Tenn. 2002). The statutory preference for rehabilitative support does not entirely displace other forms of spousal support when the facts warrant long-term or more open-ended support. *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995).

Initial decisions regarding the entitlement to spousal support, as well as the amount and duration of spousal support, hinge on the unique facts of each case and require a careful balancing of all relevant factors, including the factors identified in Tenn. Code. Ann. §36-5-101(d)(1). *Robertson v. Robertson*, 76 S.W.3d at 338; *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999). Among these factors, the two considered to be the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Robertson v. Robertson*, 76 S.W.3d at 342; *Bogan v. Bogan*, 60 S.W.3d at 730; *Manis v. Manis*, 49 S.W.3d 295, 304 (Tenn. Ct. App. 2001). Of these two factors, the disadvantaged spouse's need is the threshold consideration. *Aaron v. Aaron*, 909 S.W.2d at 410. The obligor spouse's ability to pay places an upper limit on the amount of spousal support that can be ordered. 2 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 17.5, at 259 (2d ed. 1987).

B.

The Evidence Regarding Fault

The pleadings in this case reflect that Mr. Davidson's principal ground for divorce was Ms. Davidson's violent and abusive conduct. This conduct escalated after the filing of the divorce complaint, and Mr. Davidson was eventually required to obtain an order of protection from the trial court. Perceiving that testimony concerning this conduct could undermine his client's case, especially her request for custody of the parties' younger son, Ms. Davidson's lawyer announced at the beginning of the trial that Ms. Davidson no longer contested Mr. Davidson's request for a divorce and that Ms. Davidson would agree to declaring the parties divorced in accordance with Tenn. Code Ann. § 36-4-129(b). Ms. Davidson's lawyer hastened to add that this concession obviated the need

for testimony about his client's conduct which he predicted would turn the trial into a "Jerry Springer circus."

The trial court agreed that introducing evidence regarding the parties' conduct during the marriage would not be helpful because the court had already heard much of the same evidence during the earlier hearing regarding the order of protection.⁷ The court characterized this evidence as depicting an "extreme case of parents fighting with each other" and lectured the parties at some length about the effect of their conduct on their children. Thereafter, the trial court stated that it did not desire to hear any evidence about Ms. Davidson's behavior unless it was in the presence of the children, and was relevant to her fitness to have custody of the parties' younger son.

Mr. Davidson did not formally object to the trial court's decision to exclude evidence of Ms. Davidson's conduct and never made a tender of the evidence of Ms. Davidson's fault that he was prepared to present. These oversights prevent him from raising this issue on appeal. An erroneous exclusion of evidence requires reversal only if the evidence would have affected the outcome of the trial had it been admitted. *Pankow v. Mitchell*, 737 S.W.2d 293, 298 (Tenn. Ct. App. 1987). Reviewing courts cannot make this determination without knowing what the excluded evidence would have been. *Stacker v. Louisville & N. R.R. Co.*, 106 Tenn. 450, 452, 61 S.W. 766, 766 (1901); *Davis v. Hall*, 920 S.W.2d 213, 218 (Tenn. Ct. App. 1995); *State v. Pendergrass*, 795 S.W.2d 150, 156 (Tenn. Crim. App. 1989). Accordingly, the party challenging the exclusion of evidence must make an offer of proof to enable the reviewing court to determine whether the trial court's exclusion of proffered evidence was reversible error. Tenn. R. Evid. 103(a)(2); *State v. Goad*, 707 S.W.2d 846, 853 (Tenn. 1986); *Harwell v. Walton*, 820 S.W.2d 116, 118 (Tenn. Ct. App. 1991). Appellate courts will not consider issues relating to the exclusion of evidence when this tender of proof has not been made. *Dickey v. McCord*, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001); *Rutherford v. Rutherford*, 971 S.W.2d 955, 956 (Tenn. Ct. App. 1997); *Shepherd v. Perkins Builders*, 968 S.W.2d 832, 833-34 (Tenn. Ct. App. 1997).

An offer of proof must contain the substance of the evidence and the specific evidentiary basis supporting the admission of the evidence. Tenn. R. Evid. 103(a)(2). These requirements may be satisfied by presenting the actual testimony, by stipulating the content of the excluded evidence, or by presenting an oral or written summary of the excluded evidence. Neil P. Cohen, et al. *Tennessee Law of Evidence* § 103.4, at 20 (3d ed. 1995). An offer of proof is not required when the substance of the evidence is apparent from the context, Tenn. R. Evid. 103(a)(2), or when the trial court's refusal to allow further evidence seriously affects the fairness of the proceedings. *First Nat'l Bank & Trust Co. v. Hollingsworth*, 931 F.2d 1295, 1305 (8th Cir. 1991); *Blankenship v. Blankenship*, No. 02A01-9603-CH-00051, 1997 WL 15241, at *3 (Tenn. Ct. App. Jan. 17, 1997) (No Tenn. R. App. P. 11 application filed).

Tenn. R. App. P. 36(a) states that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was available to prevent or nullify the harmful effect of an error." We have carefully examined this record and cannot find any statement by Mr. Davidson's lawyer that can reasonably be construed as an objection to the

⁷ Of course, none of this evidence is in the record.

trial court's decision to exclude the evidence regarding Ms. Davidson's conduct.⁸ Likewise, the record contains no indication that Mr. Davidson ever made a tender of the evidence he would have presented had it not been for the trial court's ruling. Accordingly, Mr. Davidson is in no position now to take issue with the trial court's decision to exclude evidence regarding Ms. Davidson's conduct.⁹

C. Ms. Davidson's Need For Spousal Support

Mr. Davidson also asserts that the trial court erred by awarding Ms. Davidson spousal support for ten years. He insists that Ms. Davidson does not need spousal support because of the amount of property she received as part of the division of the marital estate and because she can earn additional income by increasing the amount of time she works at her part-time job. We find little merit in either argument.

The property a spouse receives as part of the division of the marital estate is an important factor when it comes to spousal support. It is one of the statutory factors that must be considered when determining the nature, amount, and duration of spousal support. Tenn. Code Ann. § 36-5-101(d)(1)(H). The Tennessee Supreme Court has also directed the trial courts to use both spousal support and marital property to address the needs of an economically disadvantaged spouse. *Robertson v. Robertson*, 76 S.W.3d at 341; *Crabtree v. Crabtree*, 16 S.W.3d at 361, n.4. While it may be theoretically possible, as Mr. Davidson asserts, that a disadvantaged spouse could receive so much marital property that he or she would not need additional spousal support, the chances that this situation could arise in the real world are slim. This case is certainly not one of those rare circumstances.

Mr. Davidson's argument on this point is undermined by the state of the record and by his failure to comply with Tenn. Ct. App. R. 7 which requires the preparation of a tabulation identifying the marital property and debts and their disposition when issues regarding the amount of marital

⁸The portions of the record cited to us by Mr. Davidson do not contain an objection to the trial court's decision or a tender of proof. Rather, they depict the trial court's explanation regarding why it did not desire to hear the testimony regarding the parties' conduct. At one point in the proceeding not cited by Mr. Davidson, his lawyer complained that "we should not be as careful about excluding stuff." This statement is not an effective objection to the exclusion of evidence.

⁹Had Mr. Davidson properly preserved this issue, we would have held that the trial court erred by excluding evidence regarding Ms. Davidson's conduct during the marriage. Giving due deference to the trial court's distaste for derogatory testimony, fault is one of the factors to consider when setting spousal support. Tenn. Code Ann. § 36-5-101(d)(1)(K). Because the evidence presented during the hearing on Mr. Davidson's petition for a protective order could not properly have been imported into this hearing, Mr. Davidson was entitled to present whatever evidence of fault he had. That being said, it is also quite likely that we would have found the trial court's errors to be harmless because Ms. Davidson's conduct, even if it was as bad as the trial court characterized it, would not have been so egregious that it would have prevented her from receiving spousal support.

property have been raised.¹⁰ Based on the record we have been provided, we have prepared the following tabulation:

Division of the Marital Estate¹¹

<u>HUSBAND</u>		<u>WIFE</u>	
<u>Assets</u>		<u>Assets</u>	
Marital Residence	\$ 88,000	1/2 Timeshare Proceeds	\$ 5,000
1/2 Timeshare Proceeds	5,000	1/2 BP Retirement	18,500
1/2 BP Retirement	18,500	1/2 BMI Retirement	4,300
1/2 BMI Retirement	4,300	1993 Maxima	5,000
1988 Cadillac	2,000	10% Lawsuit #1	
1992 Nissan Truck		10% Lawsuit #2	279
1990 Skylark	700	Consortium Claim in Lawsuit #2	1,200
90% Lawsuit #1		Personal Property	
90% Lawsuit #2	2,500		
Personal Property			
Total Assets	121,000	Total Assets	34,279
<u>Debts</u>		<u>Debts</u>	
Mortgage	69,000	Student Loans	2,800
1/2 2000 Tax Debt		1/2 2000 Tax Debt	
Pre-2000 Tax Debt	3,600		
Lien on 1992 Nissan Truck	3,900		
Chapter 13 Lien			
Total Debts	76,500	Total Debts	2,800
Estate Received	44,500	Estate Received	31,479
Lump Sum Payment to W ¹²	9,542.78	Lump Sum Payment from H	9,542.78
Net Funds Received	\$34,957.22	Net Funds Received	\$41,021.78

The proof demonstrates that the Davidsons' marital estate is extremely modest. Despite the duration of their marriage, their financial mismanagement, bankruptcies, and personal spending

¹⁰This rule applies not only to issues directly involving the manner in which trial courts divided the marital property or allocated the marital debts, but also to issues whose disposition depends on the manner in which the trial court divided the marital property. In this case, Mr. Davidson is taking issue with the award of spousal support based upon the amount of marital property Ms. Davidson received. Because his argument involves the division of marital property, he should have filed a Tenn. Ct. App. R. 7 tabulation.

¹¹The amount or value of several items cannot be found in the record or derived from information that is in the record. These items include the 1992 Nissan truck, the Chapter 13 lien claimed by Mr. Davidson, the student loans in excess of \$2,800 claimed by Ms. Davidson, the personal property, and the anticipated recovery in one of Mr. Davidson's pending personal injury lawsuits.

¹²The lump sum payment to Ms. Davidson represents one-half of the equity in the marital residence (\$9,500) plus \$42.78 which represents the difference between one-half of the equity in the 1988 Cadillac (\$1,000) minus the amount of the three checks payable to Mr. Davidson that Ms. Davidson wrongfully cashed (\$957.22).

habits¹³ prevented them from accumulating many capital assets. Their net marital estate was worth approximately \$76,000. Based on the manner in which the trial court divided the marital property and allocated their marital debts, Ms. Davidson received property worth approximately \$41,022. However, only \$13,222 of this property was liquid and immediately available to Ms. Davidson.¹⁴ Because Ms. Davidson's monthly expenses apparently exceeded the combined amount of her income and the amount of spousal support she received,¹⁵ the trial court stated specifically that it anticipated that Ms. Davidson would be forced to spend the liquid assets she received in the property settlement to support herself. We agree. It is reasonable to anticipate that Ms. Davidson will spend whatever funds she receives in relatively short order. Accordingly, we decline to find that the value of the property Ms. Davidson received as her share of the marital estate is so large that it obviates the need for an award of rehabilitative spousal support.

Mr. Davidson also argues that Ms. Davidson does not need as much spousal support as the trial court awarded her because she could earn additional income by increasing the number of hours she works at The Dress Barn. We need not tarry long on this point. Mr. Davidson came forward with no direct evidence that The Dress Barn had more work for Ms. Davidson to do. More importantly, this argument overlooks the effect that the divorce will have on Ms. Davidson's circumstances. She will now be a single mother. In addition to her current full-time and part-time employment, she will have the responsibility for raising one of her sons and will also have the added burden of her studies if she returns to school as planned. We reject the cynical notion that Ms. Davidson should be expected to increase the amount of time she is working at her part-time job simply to keep Mr. Davidson from paying spousal support.

D.

Mr. Davidson's Ability to Pay Spousal Support

As a final matter, Mr. Davidson argues that the amount of his spousal support obligation is too high. He asserts that the trial court erred by including his overtime income and annual bonuses when it was considering his ability to pay spousal support and that the trial court should have limited its consideration to his regular base salary. This argument lacks even a colorable legal foundation.

Tenn. Code Ann. § 36-5-101(d)(1)(A) directs the courts to set spousal support based on both parties' "earning capacity" and "income from . . . all other sources." Certainly income in the form of overtime pay or a bonus is "income" for the purpose of that statute. The Tennessee Supreme Court has reversed a spousal support award in part because the trial court had failed to consider the obligor spouse's overtime income, *Robertson v. Robertson*, 76 S.W.3d at 343, and this court has

¹³Mr. Davidson accused Ms. Davidson of spending most of her income for herself. For her part, Ms. Davidson accused Mr. Davidson of gambling. She also admitted that "we both did what we wanted with our money."

¹⁴Her interest in the parties' retirement accounts (\$22,800) was not liquid, and the Nissan Maxima, valued at \$5,000 was a depreciating asset needed for transportation.

¹⁵Ms. Davidson originally produced an income and expense statement that did not reflect her anticipated housing expenses, her student loan payment, and the income from her part-time job. The trial court ordered a recess to give her an opportunity to prepare an amended statement. Neither the original nor the amended income and expense statement is in the record; therefore, we cannot determine with certainty that exact amount of the monthly deficit between Ms. Davidson's income and her expenses.

repeatedly approved spousal support awards in which the obligor spouse's overtime pay and annual bonuses were taken into consideration. *E.g., Nelson v. Nelson*, No. W2001-01515-COA-R3-CV, 2002 WL 1760450, at * 3 (Tenn. Ct. App. July 23, 2002) *perm. app. filed* (Tenn. Sept. 25, 2002) (approving a spousal support award that took overtime pay into consideration); *Page v. Page*, No. W2000-01314-COA-R3-CV, 2001 WL 523960, at *3 (Tenn. Ct. App. May 15, 2001) (No Tenn. R. App. P. 11 application filed) (approving an award of a percentage of a bonus check as alimony in solido); *Hanselman v. Hanselman*, No. M1998-00919-COA-R3-CV, 2001 WL 252792, at *3 (Tenn. Ct. App. Mar. 15, 2001) (No Tenn. R. App. P. 11 application filed) (approving a spousal support award taking the obligor spouse's overtime pay into consideration); *Dempsey v. Dempsey*, No. M1998-00972-COA-R3-CV, 2000 WL 1006945, at *8, n.9 (Tenn. Ct. App. July 21, 2000) (No Tenn. R. App. P. 11 application filed) (approving a spousal support award based on the obligor spouse's average income including overtime and bonuses); *Cartee v. Cartee*, No. 03A01-9801-CV-00030, 1998 WL 959671, at *1 (Tenn. Ct. App. Dec. 31, 1998) (No Tenn. R. App. P. 11 application filed) (approving a spousal support award including the obligor spouse's overtime pay).¹⁶

Mr. Davidson's base salary as an employee of BP Oil Company is \$36,000 per year. However, in addition to his base pay, Mr. Davidson has earned an annual bonus ever since BP has instituted its bonus program. While the amount of the annual bonus varies from year to year, Mr. Davidson earned between \$4,000 and \$9,000 in bonuses during the three years immediately preceding the divorce trial. In addition, he has consistently supplemented his regular income by working overtime. While Mr. Davidson asserted at trial that he anticipated the availability of overtime to decrease, he stated unequivocally that he expected to earn \$50,000 per year at BP for the foreseeable future. In addition to his income from BP, Mr. Davidson stated that he earned between \$1,000 and \$2,000 each year from his part-time landscaping and car detailing business.

Mr. Davidson earned more than \$50,000 in 2000 and stated that he expected to earn \$50,000 for the next few years. In light of this admission, the trial court did not err by concluding that Mr. Davidson was able to pay spousal support and by calculating his spousal support obligation on the assumption that he was earning \$4,000 per month. If anything, the trial court erred in Mr. Davidson's favor. However, because Ms. Davidson has not taken issue with the amount of the spousal support award, we affirm the trial court's decision with regard to spousal support.

IV.

We affirm the trial court's decision to require Mr. Davidson to pay Ms. Davidson \$600 per month in spousal support until their older child graduates from high school and then \$250 per month for eight years. We remand the case to the trial court for any further proceedings that may be required and tax the costs of this appeal to Henry Lee Davidson, Sr. and his surety for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUDGE

¹⁶The approach we use to calculate an obligor spouse's income for the purpose of setting spousal support is substantially similar to the approach we use to determine an obligor parent's income for the purpose of setting child support.